

No. 7832

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN P. McLAUGHLIN, as United States
Collector of Internal Revenue, First
District of California,

Appellant,

VS.

COOS BAY LUMBER COMPANY
(a corporation),

Appellee.

On Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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Appellee.

On Appeal from the District Court of the United States for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

This is an appeal from the judgment entered by the District Court on November 22, 1934, in favor of the appellee, plaintiff below, and against the appellant, defendant below, permitting recovery in an action at law of \$2615.04, documentary Internal Revenue stamp taxes and interest, assessed against and paid to appellant by appellee for the taxable period February, 1928, together with interest and costs. (R. 50-51.) Petition for appeal, assignments of error, notice, and citation on appeal, were filed by appellant

on February 20, 1935. (R. 55-61.) The appeal was allowed by the District Court on that date. (R. 55.)

The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

QUESTION PRESENTED.

Whether the transactions involved constitute taxable transfers, by the former bondholders of the Pacific States Lumber Company, whose name was subsequently changed to Coos Bay Lumber Company, to their trustees, or nominees, of legal title to, or their respective rights to subscribe for, or to receive legal title to, and the 63,757 shares of first preferred, \$100 par value, stock and 63,757 shares common, no par value, stock of Coos Bay Lumber Company, issued direct to such trustees, or nominees, in conformity with certain agreements and a plan of reorganization, in consideration for said bondholders' bonds, within the meaning of the provisions of Section 800 and Schedule A-3, Title VIII, of the Revenue Act of 1926, and Regulations 71, Articles 31 to 34, inclusive, particularly Article 34 (t). No opinion was rendered by the District Court.

STATUTES AND REGULATIONS INVOLVED.

The pertinent provisions of the statutes and regulations involved are set forth in the appendix, *infra*.

STATEMENT OF THE CASE.

This action at law was instituted in the United States District Court for the Northern District of California, Southern Division, on June 28, 1932, by Coos Bay Lumber Company, formerly Pacific States Lumber Company, a corporation, appellee herein, plaintiff below, against John P. McLaughlin, Collector of Internal Revenue, appellant herein, defendant below, for the recovery of \$2615.04, assessed documentary stamp taxes and interest in the amounts of \$2550.28 and \$64.76, respectively, imposed at the rate of 2 cents per share, on the claimed transfer by the owners, or holders, of bonds of the Pacific States Lumber Company, to the trustees, or nominees, of said bondholders, of legal title to, or their respective rights to subscribe for, or to receive legal title to, and the 127,500 shares of stock of Coos Bay Lumber Company, upon issuance in consideration for their bonds, under the provisions of Section 800 and Schedule A-3, Title VIII, of the Revenue Act of 1926.

The appellee's complaint (R. 1-34) alleges that it had been illegally required to pay an assessment of documentary stamp taxes and interest in the aggregate of \$2615.04, no stamps having been purchased, affixed, and cancelled, by reason of such claimed transfer by such bondholders to their trustees, or nominees, in consideration for the bonds of said bondholders; that said trustees received and held said stock as an original issue and not by transfer in any wise from any persons whomsoever; and that said tax was erroneously and illegally assessed and collected, was filed

on June 28, 1932. On November 7, 1932, the appellant filed his answer (R. 34-38) to said complaint in the form of a general issue plea. On May 10, 1934, the parties filed their stipulation of facts and amendment of complaint (R. 39-48), written waiver of jury (R. 38), and the case was tried to the court without a jury on that date. (R. 51.) The stipulation of facts and amendment of complaint (R. 39-48) was offered and received in evidence on behalf of the appellee, without objection. Thereupon, both parties rested and the appellee moved for judgment in its favor and moved the court to conclude from the stipulated facts that as a matter of law the newly created trustees referred to in said stipulation of facts were the only persons who ever had a right to receive the stock in question, that there never was a transfer to them by the bondholders or any other person or body of a right to receive said stock, and that the transaction did not constitute a taxable transaction. Thereupon, the appellant moved for judgment in his favor, and further moved the court to conclude from the stipulated facts that as a matter of law the bondholders referred to in said stipulation of facts had a right to receive the stock issued in consideration for their bonds and transferred to the newly created trustees such right, and that said transaction constituted a taxable transaction. Thereupon, the court took the motions of plaintiff and defendant under submission and thereafter briefs were submitted by the parties. (R. 51-52.)

On November 22, 1934, the court granted the appellee's motions, to which the appellant duly excepted,

and the appellant assigned said exception as appellant's exception No. 1. On November 22, 1934, the court denied appellant's motions and the appellant excepted and assigned said exception as appellant's exception No. 2. (R. 51-52.) The court thereupon ordered judgment to be entered in favor of the appellee and against the appellant, without opinion, findings of fact and conclusions of law. (R. 49, 52.) On November 22, 1934, the Clerk of the District Court entered a formal judgment in favor of the appellee and against the appellant in the sum of \$2615.04, with interest at the rate of 6 per cent per annum on \$1575.13 from February 25, 1928, until paid, and \$1039.91 from February 11, 1931, until paid, together with costs taxed \$10. (R. 50-51.) Thereupon the appellant filed his bill of exceptions (R. 51-52), stipulation of the parties in re bill of exceptions, and orders settling bill of exceptions which were allowed and approved by the court on February 15, 1935. (R. 53-54.) On February 20, 1935, the appellant filed his petition for appeal (R. 55), assignment of errors (R. 56-57), notice of appeal (R. 58), praecipe for transcript of record (R. 58-59), clerk's certificate (R. 59-60), and citation (R. 60-61), which were approved and allowed by the court, without bond or other security, on that date. (R. 55.)

The detailed facts are set forth in the complaint (R. 1-12) and Exhibits A (R. 13-23), B (R. 24-32), and C (R. 33-34), thereto attached, the answer (R. 34-38), the stipulation of facts and amendment of complaint and Exhibit D (R. 39-48), thereto attached, and are in substance as follows:

On September 18, 1925, the Pacific States Lumber Company, whose name was subsequently changed to Coos Bay Lumber Company, had issued and outstanding its first mortgage bonds in the principal amount of \$7,000,000 and was in default in payment of principal and interest. (R. 2.) This amount of outstanding bonds was subsequently reduced to \$6,375,700. (R. 5.)

In September, 1925, there was organized a Bondholders' Protective Committee and on September 18, 1925, such committee and the bondholders of Pacific States Lumber Company, entered into an agreement (R. 13-23), providing for the transfer, assignment, delivery, and deposit of all of their said bonds, including title and all rights and powers of every kind and description given by law, or by the terms of said bonds or any instrument securing the same, except the beneficial ownership thereof, to and with said Bondholders' Protective Committee, for the purposes therein specified, in exchange for negotiable receipts to be issued, by the specified depository receiving such bonds, to such bondholder, each of whom, upon accepting such negotiable receipts, and all transferees thereof, become fully bound by and a party to such agreement, the same as if each had signed the same. (R. 2, 3, 13-23.)

On April 19, 1927, said Bondholders' Protective Committee adopted a plan and agreement of reorganization of Pacific States Lumber Company (R. 44-48), which provided for the cancellation of all of the outstanding stock of Pacific States Lumber Company;

the issuance of first preferred stock, 7 per cent cumulative, in the amount of \$6,827,700; second preferred stock, 6 per cent dividend paying, redeemable at par and accumulations, in the amount of \$1,000,000; and 68,277 shares of no par value common stock of such corporation. All of the first preferred stock and common stock were to be issued, share and share alike, in exchange for each \$100 principal of such outstanding bonds, to trustees of such bondholders, and any of such stock not so issued was to be cancelled. All of the second preferred stock was to be issued to a trustee for the former stockholders of such corporation, of all classes, and divided in such proportion as such classes determine. In addition, such plan and agreement provided for the creation of a trust to receive, hold, and vote such first preferred and common stock for the benefit of the owners thereof, with discretionary power to sell all or either as a unit, upon terms sufficient to retire or purchase all of the first preferred stock at not less than par and accumulated dividends, unless otherwise authorized or instructed by 75 per cent of the first preferred stockholders. Such plan also provided for the sale or mortgaging of all the assets of the company upon a majority vote of such common stock and the appointment by the four investment bankers, who were the owners or holders of said outstanding bonds, of four voting trustees and their respective successors, with power in such trustees to select and appoint a fifth trustee as chairman. Such plan and agreement contained the further provisions: that suitable trust certificates,

representing such stock, which are transferable, shall be prepared, issued, and delivered by such trustees to such bondholders, or persons, or parties, entitled thereto, as evidence of their beneficial interest in said stock, and that the members of such Bondholders' Protective Committee shall constitute the managers of such plan of reorganization with full power to perform any and all acts necessary to complete the same. (R. 44-48.)

The plan and agreement adopted on April 19, 1927, by the Bondholders' Protective Committee, was adopted, ratified, approved, consented to, and agreed to, by each of such bondholders, as therein provided and in conformity with the letter transmitting the same, and such bondholders named the members of such Bondholders' Protective Committee as their trustees under such trust agreement. (R. 40.)

On January 27, 1928, the Bondholders' Protective Committee, by resolution, requested the Pacific States Lumber Company to complete its corporate reorganization in accordance with such plan and agreement and to issue 63,757 shares of its first preferred stock and 63,757 shares of its no par value common stock to the trustees named pursuant to Section 3 of said plan and agreement. On that date the directors of plaintiff corporation, by resolution, duly adopted, spread such request upon its records and empowered and instructed its officers to carry out all of the acts provided in such plan and agreement to be performed by such corporation. (R. 5.)

On February 15, 1928, the Pacific States Lumber Company changed its corporate name to Coos Bay Lumber Company, the appellee herein. (R. 2.)

On February 23, 1928, the members of such Bondholders Protective Committee, as such, entered into the Stock Trust Agreement of Coos Bay Lumber Company (R. 24-32), with themselves as managers and trustees under the trust agreement hereinbefore mentioned, wherein, among other matters and things it is provided (R. 24-25) :

Whereas, the Committee has caused to be delivered to said trustees, certificates representing 63,757 shares of the first preferred stock and an equal number of shares of no par value common stock of Coos Bay Lumber Company (formerly Pacific States Lumber Company) to be held by said trustees for and on behalf of the beneficial owners thereof as designated by the Committee.

Now, therefore, it is agreed as follows:

1. The Trustees shall issue trust receipts and cause the same to be delivered to said beneficial owners, the form thereof to be substantially, as follows:

“No.....Units

Coos Bay Lumber Company

First Preferred and Common Stock Trust Receipt

This Certifies that as hereinafter provided and on surrender thereof..... will be entitled (out of certificates hitherto delivered to the undersigned trustees under the agreement hereinafter mentioned) to receive certificates for.....shares of 7% first

preferred stock with dividends cumulative from July 1, 1925 and for an equal number of shares of no par value common stock of Coos Bay Lumber Company (formerly Pacific States Lumber Company) and to receive payments equal to any dividends which may be collected by the Trustees upon such shares of stock received and held by the Trustees under said agreement.

This receipt is issued pursuant and subject to an agreement dated February 23, 1928 and executed by and between * * *, the Pacific States Lumber Company Bondholders' Protective Committee and * * *, Trustees, * * *."

On or about February 25, 1928, the Coos Bay Lumber Company issued 63,757 shares of its first preferred stock and 63,757 shares of its no par value common stock to said Trustees, to whom said stock was to be, and was issued in accordance with said agreements, resolutions, and said plan and agreement of reorganization, in one certificate, and at the same time such corporation issued to F. A. Warner, as trustee for the former stockholders of Pacific States Lumber Company, 10,000 shares of its second preferred stock, in accordance with said agreements, resolutions, and plan and agreement, in one certificate. (R. 6.)

Thereafter the Commissioner of Internal Revenue assessed documentary stamp taxes against the appellee corporation, on such transfer by the bondholders of the Pacific States Lumber Company, or their Bondholders' Protective Committee, to their trustees, of legal title to, or their respective rights to receive legal title to, and the stock issued by Coos Bay Lumber

Company, in consideration for the bonds of Pacific States Lumber Company, in the amount of \$2550.28, and a like tax of \$200 on the transfer by the former stockholders of Pacific States Lumber Company to their trustee, F. A. Warner, of legal title to, or their respective rights to receive legal title to, and the stock issued by Coos Bay Lumber Company direct to such trustee, in consideration for their Pacific States Lumber Company stock, which was paid to the appellant, Collector of Internal Revenue, in the amount of \$2750.28 together with interest in the amount of \$64.76, by application of a credit of \$1575.13 and cash in the amount of \$1239.91, aggregating in all \$2815.04, on February 25, 1928, and February 11, 1931, respectively. (R. 10, 36-37.)

On February 24, 1931, the appellee corporation filed its claim for refund No. 23104 of tax so paid in the amount of \$2615.04, being the amount of \$2815.04, less the \$200 paid on the transfer by the former stockholders of Pacific States Lumber Company to their trustee, of legal title to, or their respective rights to receive legal title to, and the stock issued in consideration for their surrendered and cancelled stock, which the appellee herein admits was due thereon, on the grounds that such trustees had the original right to receive the other stock issued and no transfer of a right to receive occurred, which was duly rejected by the Commissioner of Internal Revenue on May 3, 1932, on the grounds that the evidence discloses the 10,000 shares of second preferred stock were not issued to the stockholders but to certain trustees, and that the

63,757 shares of first preferred stock and 63,757 shares of common stock, which were issued through an agreement with bondholders, were not issued to such bondholders but to trustees and that the rights of the stockholders and the bondholders to receive these shares of stock were, therefore, transferred and such transfer is subject to tax under Schedule A-3, of the Revenue Act of 1926. (R. 10-11, 33-34.)

SPECIFICATION OF ERRORS TO BE URGED.

The errors assigned and upon each of which appellant relies, numbered I to V, inclusive, are found in the record, pages 56-57, and are incorporated herein by reference.

All of the assignments of error are argued under the question presented in this case, and relied upon the same as if herein fully set out.

ARGUMENT.

At the outset, if the stipulated and admitted facts in this case (R. 1-48) are considered to be the equivalent of either an agreed statement of ultimate facts or an agreed statement of evidentiary facts, the review, in any event, extends to a determination of the question of whether the agreed facts support the judgment (*Supervisors v. Kennicott*, 103 U. S. 554; *Kansas City Life Ins. Co. v. Shirk*, 50 F. (2d) 1046 (C. C. A. 10th); *Lumbermen's Trust Co. v. Town of Ryegate*,

61 F. (2d) 14 (C. C. A. 9th); *Kirkman v. Farmers' Sav. Bank*, 28 F. (2d) 857 (C. C. A. 8th)), and may extend to all questions of law. *Kearney v. Case*, 12 Wall. 275; *United States v. Eliason*, 16 Pet. 291; *Campbell v. Boyreau*, 21 How. 223; *Supervisors v. Kennicott*, *supra*. However, the review with the motions for judgment and exceptions saved (R. 52) extends to a determination of whether the general finding, if any made by the court, is supported by the stipulated facts and whether all of the questions of law have been properly decided. *Maryland Casualty Co. v. Jones*, 279 U. S. 792; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *Bank of Watertown v. Fidelity & Deposit Co.*, 299 Fed. 478 (C. C. A. 5th), certiorari denied, 266 U. S. 618; *Dunsmuir v. Scott*, 217 Fed. 200 (C. C. A. 9th); *McLaughlin v. Pacific Lumber Co.*, 66 F. (2d) 895 (C. C. A. 9th), reversed, 293 U. S. 351; *United States v. Jefferson Electric Co.*, 291 U. S. 386.

In this connection, if the stipulated facts are considered an agreed statement of ultimate facts, no findings of fact were necessary. However, an examination of the admitted and stipulated facts does not disclose that the appellant either admitted or stipulated that "no transfer of legal title to, or any rights to receive legal title to, or the actual shares or certificates of stock issued was in fact made or effected". Hence, the judgment entered is not sustained by any finding of ultimate fact. On the other hand, if the stipulated facts are considered an agreed statement of evidentiary facts, which they unquestionably are, findings

of fact were necessary. (R. S. 649 (U. S. C., Title 28, Sec. 773); *Insurance Co. v. Boon*, 95 U. S. 117.) However, no findings of fact were made by the court (R. 49), hence, it necessarily follows that the judgment (R. 50) is not supported by any findings of fact.

Thus it is seen that the judgment entered by the District Court is not supported by any ultimate finding and should be reversed (*Universal Battery Co. v. United States*, 281 U. S. 580; *Routzahn v. Willard Storage Battery Co.*, 291 U. S. 386, 410) unless the minute order (R. 49) is considered the equivalent of a general ultimate finding regardless of the provisions thereof to the contrary in which event, it cannot be fairly said such adverse finding naturally follows or flows from the admitted and stipulated facts as a natural inference when such facts are all to the contrary, and the evidence (R. 1-48) fails to disclose either any sufficient or any substantial evidence to sustain such adverse finding or conclusion. Hence, the judgment (R. 50) should be reversed in any event. However, should the court determine further consideration of this case necessary, then the following argument applies.

The transactions involved constitute taxable transfers by the Bondholders of the Pacific States Lumber Company to their Trustees, or Nominees, of legal title to, or their respective rights to subscribe for, or to receive legal title to, and the 127,514 shares of First Preferred and No Par Value Common stock issued direct by the Coos Bay Lumber Company to such Trustees, or Nominees, in conformity with certain agreements and

plan of reorganization in consideration for said Bondholders' bonds, within the meaning of the provisions of Section 800 and Schedule A-3, Title VIII, of the Revenue Act of 1926, and Articles 31-34, of Treasury Regulations 71 promulgated thereunder.

The appellee, plaintiff below, contends that the newly created trustees referred to in the stipulation of facts were the only persons who ever had a right to receive the stock issued direct to them by the Coos Bay Lumber Company in consideration for the bonds issued by the Pacific States Lumber Company; that there never was a transfer to them by the bondholders, or any other person, or body of a right to receive said stock; and that the transaction did not constitute a taxable transfer. The appellant, defendant below, contends that the bondholders referred to in the stipulation of facts had the right to receive the stock so issued in consideration for their bonds; that such bondholders transferred legal title to, or their rights to receive legal title to, or such stock to their newly created trustees, also referred to in the stipulation of facts; and that such transaction constitutes a taxable transfer.

The court sustained the appellee's motion for judgment on the basis of its contentions, concluded that no findings of fact or conclusions of law were necessary, and ordered that judgment be entered in favor of the appellee, plaintiff below, in the sum of \$2615.04, with interests and costs. (R. 49.)

The evidence (R. 1-48), none of which is disputed, discloses that the bondholders of the Pacific States

Lumber Company, under an agreement dated September 18, 1925, organized or appointed a Bondholders' Protective Committee to which they transferred, by assignment and delivery, legal title to and their respective bonds for certain subsequent transfer, or delivery, for certain purposes, reserving unto themselves ownership, or their beneficial interests therein, and accepted negotiable receipts of such committee, as evidence of such ownership or beneficial interest (R. 2-3, 13-23); that thereafter, such protective committee and such bondholders adopted and authorized the execution and carrying out of a plan and agreement of reorganization dated April 19, 1927 (R. 42-48), with the members of such protective committee as managers thereof, which the stockholders of, and the Pacific States Lumber Company in September, 1927, became a party to and agreed to carry out (R. 5); that such protective committee on January 27, 1928, requested the Pacific States Lumber Company to complete its reorganization and on that date such corporation authorized and directed its officers to complete the same; that on February 15, 1928, the Pacific States Lumber Company duly changed its name to Coos Bay Lumber Company; that on February 23, 1928, such protective committee, such managers of the plan and agreement of reorganization, and the trustees, the membership of each being the same identical persons, appointed by such bondholders, or their representatives, entered into a stock trust agreement (R. 24-32); that on or about February 25, 1928, such protective committee transferred or delivered the bonds held by them to the Coos Bay Lumber Company which on that

date issued and delivered to such trustees legal title to and 63,757 shares of its first preferred stock and 63,757 shares of its common stock, in consideration for the bonds of such bondholders, and on or about that date, said trustees, issued and delivered their trust receipts to said bondholders as evidence of said bondholders' ownership of, or beneficial interest in and to said stock; and that in addition, said corporation issued and delivered to F. A. Warner, as trustee for the former stockholders of such corporation, 10,000 shares of its second preferred stock in consideration for their surrendered and cancelled stock in accordance with said plan and agreement of reorganization to which said stockholders had become parties (R. 6), with respect to which, the appellee admits the tax paid on such transfer in the amount of \$200 under the provisions of the identical statute was legally assessed and collected. (R. 10, 36-37.)

In other words, the evidence conclusively shows that the bondholders purchased and paid for the stock issued by assignment and delivery of their bonds and that the trustees received and held legal title to and the shares of stock so issued, which the trust receipts show the real or beneficial ownership of to be vested in the bondholders and not the trustees.

The only inference of fact or conclusion of law that may be fairly drawn from such evidence is that the trustees obtained the right to receive legal title to and the shares of stock issued from the bondholders who paid the consideration therefor by assignment in blank and delivery of their bonds, or that the bondholders,

by execution of certain agreements and plan of reorganization, thereby transferred to their trustees, or nominees, legal title to, or their respective rights to subscribe for, or to receive legal title to, and the actual shares of stock issued by appellee direct to such trustees in consideration for the bonds of such bondholders. Any inference of fact, or conclusion of law to the contrary, is in direct opposition to the evidence and would, of course, have nothing to sustain it. The appellee, in effect, concedes these statements to be accurate with respect to the like transfer by the former stockholders effected upon the issuance of the 10,000 shares of its second preferred stock to the trustee for such former stockholders of appellee corporation as a part of the same transaction. (R. 10, 36-37.)

The respective rights of the bondholders to receive the consideration paid, namely the stock issued, for their bonds are inherent rights incident to and coextensive with their respective rights of ownership of said bonds whether they hold legal title thereto themselves, or possess negotiable trust receipts representing or evidencing such ownership.

If the right to receive legal title to and the stock issued by appellee in consideration for their bonds was not inherent in such bondholders but rested solely with the newly created trustees, then no necessity existed for the agreements dated September 18, 1925 (R. 13-23), April 19, 1927 (R. 44-48), May 4, 1927 (R. 42-43), and February 23, 1928 (R. 24-32), and the appellee is in error with respect to the \$200 item of the total tax assessed and paid which it concedes was legally

assessed and collected on a part of the same transaction.

With the burden of proof resting squarely upon the appellee, plaintiff below, it made no attempt and has completely failed to show by the evidence just how such right to receive arose in the trustees appointed by the bondholders, or their representatives, or from whom they obtained it, or explain just why the appellee issued the stock to the trustees, or for what consideration flowing from them; consequently the record contains neither any sufficient nor any substantial evidence to sustain the judgment.

Section 800 and Schedule A-3, Title VIII, of the Revenue Act of 1926, clearly provide that the tax of 2 cents per share is imposed on all sales, or agreements to sell, or memoranda of sales, or deliveries, or transfers of legal title to shares or certificates of stock, or of profits or interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates (*Travis v. Ann Arbor Co.*, 168 N. Y. Supp. 53, affirmed on appeal, 227 N. Y. 640; *George A. Hormel & Co. v. United States*, 10 Fed. Supp. 623 (Minn.)), and it is elemental that one cannot read into the statute any exceptions or exemptions merely because the transfers may be termed technical or formal. (*George A. Hormel & Co. v. United States, supra.*) This is particularly true when it is considered that the statute applies to all transfers of every kind or character. Consequently it makes no difference whether the transfers are made to an employee, nominee, agent, transfer agent, trustee, voting

trustee, legatee, or stockholder, except that the transfer to the stockholder, like that of an outright purchaser, covers not only legal title but the beneficial interest as well, and the method or medium employed in effecting the transfer is not the determining factor.

In the instant case the bondholders owned, furnished and, through their protective committee, delivered and paid the consideration for the stock issued by appellee to their newly created or authorized trustees. Hence, such bondholders, not their trustees, were legally entitled by reason of such ownership and their inherent rights coextensive therewith, to receive legal title to and such stock upon issuance. *Rockefeller v. United States*, 257 U. S. 176; *Stange v. United States*, 68 C. Cls. 395, affirmed, 282 U. S. 270; *Rensselaer & S. R. Co. v. Irwin*, 249 Fed. 726 (C. C. A. 2d), certiorari denied, 246 U. S. 671; *Marconi Wireless Telegraph Co. v. Duffy*, 273 Fed. 197 (N. J.); *United States v. Brown Fence & Wire Co.*, 9 Fed. Supp. 1008 (N. D. Ohio); *Consolidated Equities v. White*, 9 Fed. Supp. 145 (Mass.); *Raybestos-Manhattan v. United States*, 10 Fed. Supp. 130 (C. Cls.), certiorari granted, May 20, 1935; *George A. Hormel & Co. v. United States*, 10 Fed. Supp. 623 (Minn.); however, such bondholders having by their agreements dated September 18, 1925 (R. 13-23), April 19, 1927 (R. 44-48); May 4, 1927 (R. 42-43), and February 23, 1928 (R. 24-32) agreed, authorized, and directed that the stock, to be issued in consideration for their bonds, be issued direct to their trustees, they thereby transferred to their trustees legal title to, or their respective rights

to receive legal title to and such shares or certificates of stock upon issuance, without transferring ownership thereof, which is now represented or evidenced by trust receipts, therefor, thus incurring the tax liability imposed by Section 800 and Schedule A-3, Title VIII, of the Revenue Act of 1926, and Treasury Regulations 71 duly promulgated thereunder. The appellee concedes the foregoing as applied to the issuance of the 10,000 shares of second preferred stock to the trustee for the former stockholders of Pacific States Lumber Company, and such inference of fact or conclusion of law is fully supported by the cases hereinbefore cited, and the decision rendered on September 10, 1935, in the case of *Founders General Corp. v. Hoey* (S. D. N. Y.), not yet officially reported but found in Vol. I, Prentice-Hall, 1935, p. 1980, wherein the court expressly held that the tax could be sustained "on the theory that the nomination of Benton & Company as the person to whom the certificate was to be issued, falls within the exact letter of the statute taxing 'transfers of legal title to * * * rights * * * to receive such shares or certificates' ", which is tantamount to holding that the transaction involved constituted a "transfer of the right to receive legal title to, or the actual shares or certificates" and not an outright "transfer of legal title" by execution of a written assignment.

The appellee on appeal will doubtless rely on the cases of *Minnesota Mining & Mfg. Co. v. Willcuts*, 2 Fed. Supp. 789 (Minn.); *Shreveport-El Dorado Pipe Line Co. v. McGraw*, 63 F. (2d) 202 (C. C. A. 5th);

Union Trust Co. v. Heiner, 26 F. (2d) 391 (W. D. Pa.); and *Westmoreland Coal Co. v. MacLaughlin*, 8 Fed. Supp. 963 (W. D. Pa.), affirmed, *per curiam*, 73 F. (2d) 1004 (C. C. A. 3d).

With respect to all of these decisions the records made did not warrant a review except in the *Westmoreland Coal Co.* case. However, the court in each of these cases not only failed to recognize the substantial difference and distinction existing between a person or corporation as the owner of property, and the trustees, nominees, or stockholders, to whom the stock was issued direct, in consideration for property or money paid by such person, or corporation, therefor (*Gibbons v. Mahon*, 136 U. S. 549; *Van Allen v. The Assessors*, 3 Wall. 573; *The Delaware Railroad Tax*, 18 Wall. 206, 230; *Tennessee v. Whitworth*, 117 U. S. 129, 136; *New Orleans v. Houston*, 119 U. S. 265, 277), but after finding facts which are in substance and effect in harmony with the findings presented in the case of *Marconi Wireless Telegraph Co. v. Duffy*, *supra*, and the cases hereinbefore cited, reached an erroneous conclusion of law as did the District Court in the instant case and no conflict in Circuit Court decisions existed at the time to warrant application for certiorari in the *Westmoreland Coal Co.* case.

Thus it is seen that the transactions involved constitute taxable transfers by the bondholders of Pacific States Lumber Company to their trustees, or nominees, of legal title to, or their respective rights to subscribe for, or to receive legal title to, and the 127,514 shares of first preferred and common stock issued

direct by the Coos Bay Lumber Company to their trustees, or nominees, in conformity with the agreements and plan of reorganization, in consideration for such bondholders' bonds within the meaning of the provisions of the above statute and regulations.

CONCLUSION.

It is urged that the judgment and conclusions of law of the District Court be reversed, and that this case be remanded to such court, with instructions to enter specific conclusions of law and judgment in favor of the appellant herein.

Dated, San Francisco,

November 1, 1935.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

STATUTES INVOLVED.

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII.—STAMP TAXES.

Sec. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax. (U. S. C. App. Title 26, Sec. 901.)

SCHEDULE A.—STAMP TAXES.

3. Capital stock, sales or transfers: On all sides, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certifi-

cates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each \$100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: PROVIDED, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: PROVIDED FURTHER, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts; PROVIDED FURTHER, That in case of sale where the evidence of transfer is shown only by the books of the corporation the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or

memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. Any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale, or who in pursuance of any such sale delivers any certificate or evidence of the sale of any stock, interest or right, or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding \$1000, or be imprisoned not more than six months, or both. (U. S. C. App., Title 26, Sec. 901.)

REGULATIONS INVOLVED.

Treasury Regulations 71, approved July 7, 1928, promulgated under the Revenue Act of 1926:

Art. 31. Basis of Tax.—Every transfer or sale of stock, either before or after issuance of a certificate, is taxable. The tax accrues at time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to shares, or certificates of stock, or of profits, or of interest in property or accumulations in any corporation, joint-stock company, or association, or of the right to subscribe for or to receive such shares or certificates, regardless of the time or manner of the delivery of the certificate or agreement or memorandum of sale.

Art. 32. Rate of Taxation.—(a) In the case of stock having a par or face value, the amount of the tax is 2 cents on each \$100 or fraction thereof of the total par or face value of the shares or certificates involved in the sale or agreement to sell, whether such aggregate par or face value is greater or less than \$100; e. g., where the total par or face of the shares involved in the transaction is \$100 or less, the tax is 2 cents; where such value is in excess of \$100, the tax is 2 cents on each \$100 or fraction thereof.

(b) In the case of shares of stock without par or face value, the tax is 2 cents on the transfer or sale of, or agreement to sell, each share.

Art. 33. Computation of the Tax.—(a) In the case of stock having a par or face value, the amount of the tax is computed upon the total par or face value of the shares and not upon the amount that may have been paid in on such stock; e. g., where stock of the par value of \$100 is sold, for which only \$25 is paid, the tax is reckoned upon the par value of \$100 and not upon the \$25 paid.

(b) Where one certificate represents several shares (however large the number of shares) on the transfer of such certificate the tax is computed upon its face value and not on the face value of each separate share of stock, or of profits, or of interest in property or accumulations; e. g., on the transfer of one certificate representing 500 shares, par value \$5, the face value of the certificate being \$2500, the stamp tax is 50 cents.

(c) In the case of stock without par or face value, the tax is computed on each share; e. g., the tax on the transfer of a certificate for 20 shares of such stock is 40 cents.

Art. 34. Sales and Transfers Subject to Tax.—The following transactions are subject to the tax:

(a) The sale, or transfer, or change of ownership, of certificates of stock, or of profits, or of interest in property or accumulations in corporations, joint-stock companies, or associations.

(b) The sale or transfer of shares of stock, whether or not represented by certificates.

(c) The transfer of stock to or by trustees.

(d) The transfer of voting trust certificates.

(e) The sale or transfer of temporary or interim certificates of stock.

(f) The sale or transfer of certificates or shares representing beneficial interests in an association. See article 77 (1) (e)—“Association”.

(g) The transfer of the interest of a subscriber for stock, however such interest may be evidenced or conditioned upon further payments.

(h) The transfer of the right to subscribe for stock in any corporation, joint-stock company, or association, whether or not evidenced by warrants.

(i) The transfer of the right to receive a stock dividend already declared.

(j) The transfer or surrender of stock to a corporation, for the purpose of the corporation, whether or not it intends eventually to sell such stock.

(k) The sale of or agreement to sell shares of stocks made by a broker, directly or indirectly, for himself.

(l) The sale or transfer of stock by a broker at a price different from that at which he accounts to his selling customer.

(m) The transfer of stock in pursuance of a gift, bequest, or conveyance by trustees.

(n) The transfer of stock from parties occupying fiduciary relations to those for whom they hold stock.

(o) The transfer of certificates of stock by an administrator or executor to the legatee or distributee.

(p) The transfer of stock on the books of a domestic corporation, regardless of where the sale is made or the stock certificates delivered.

(q) The sale, transfer, or delivery, within the territorial jurisdiction of the United States, of shares of stock of a foreign corporation.

(r) The transfer of stock of a corporation to be merged to the merging corporation prior to the actual merging and as a condition precedent to the merger.

(s) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation is a transfer by the act of the parties, and not wholly by operation of law.

(t) The transfer of the right to receive stock which a corporation has unconditionally agreed to issue.

(u) Transfers of stock are subject to the tax even though the holders thereof are not entitled in any manner to the benefit of the stock.

(v) Transfer of stock from old firm to new firm succeeding to its business where personnel is different.

(w) Transfer of stock from a firm to individual members thereof upon dissolution of the business.

